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Azlan bin Alias v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO D-05–22 OF 2004
LOW HOP BING, ABDULL HAMID EMBONG AND AHMAD MAAROP JJCA
26 JUNE 2009

C

Criminal Law — Penal Code — s 408 — Criminal breach of trust — Manager of bank instructing subordinates to transfer funds to his own account — Whether accused a servant under s 408 notwithstanding resignation — Accused chosen to remain silent in defence — Whether criminal breach of trust established beyond reasonable doubt

D

Criminal Procedure — Accomplice — Witness, as — No evidence of participation in commission of offence — Whether there was wrongful act accompanied by guilty mind — Whether witness accomplice

E

Evidence — Accomplice — Witness — No evidence of participation in commission of offence — Whether there was wrongful act accompanied by guilty mind – Whether witness accomplice

F

Evidence — Documentary evidence — Computer printout — Certificate was not produced — Whether admissible — Evidence given by witness having knowledge of operations of computer in question — Printout obtained from computer in course of its ordinary use — Printout admissible — Evidence Act 1950 s 90A

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The appellant ('the accused'), a branch manager at the Machang branch of Bank Pertanian Malaysia was charged under s 408 of the Penal Code ('Code') with criminal breach of trust in relation to monies which had been entrusted to him. The accused had directed SP6, the administrative assistant in charge of the financial unit at Bank Pertanian Machang and SP7, the teller at the same bank, to clear the accused's personal MBB cheques between 6 and 9 July, 1997 and credit them into his Patriot Perdana Account. The accused was found guilty, convicted and sentenced to three years imprisonment and three strokes of whipping. His appeal against the conviction and sentence was dismissed by the High Court and hence this appeal. Learned defence counsel raised the following arguments: (i) that upon resignation on 9 July 1997, the accused was no longer the branch manager of Bank Pertanian Machang, and

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hence not a servant under s 408; (ii) that the computer-generated documents tendered through SP4 were inadmissible as they had not satisfied the requirements of s 90A of the Evidence Act 1950 ('the Act'), and SP4 was not the person responsible for the computer that produced the documents but had merely examined them without explaining how and where he got the documents; (iii) that SP6 and SP7 were accomplices, whose evidence should be corroborated, or treated with great suspicion or there should be warning on the danger of acting on such evidence; and (iv) that the MBB cheques, being bills of exchange drawn by the accused between 6 and 9 July 1997, were validly and properly presented for clearance, but by 9 July 1997 they had yet to be cleared, in which case, the said cheques or the underlying transactions could not form the basis of any charge framed under s 408 between 6 and 9 July 1997.

Held, dismissing the appeal:

(1) On 9 July 1997, the accused was still the branch manager, as his resignation had yet to be accepted by Bank Pertanian, and the accused had continued to direct SP6 and SP7 to honour his MBB cheque. The accused's conduct clearly indicated that he had not relinquished his post as the branch manager. He was still the branch manager in charge when he gave the said directive to his subordinates. His purported resignation did not ipso facto exonerate him from his criminal liability for the directive given to his subordinates and the transaction that had taken place on that date (see paras 6 & 7).

(2) Section 90A of the Act is intended to facilitate rather than to obstruct the admissibility of documents, and statements contained therein, produced by computers. SP4 was the internal auditor based at the Bank Pertanian Head Office in Kuala Lumpur on the material dates. He gave oral evidence of his knowledge of the operations of and access to Bank Pertanian's computer, from which he could view and obtain the documents of the branches. He had obtained the aforesaid documents which were the printouts from the computer in the course of its ordinary use. These computer-generated documents were tendered as exhibits and these documents satisfied the requirements of s 90A (see paras 13 & 16).

(3) To treat SP6 and SP7 as accomplices, there must be evidence of their participation in the commission of the offence supported by a wrongful act and accompanied by a guilty mind. The defence had never suggested the complicity or guilty mind of SP6 and SP7 in relation to their role or participation in the transfers and withdrawals of the amount in question. SP6 and SP7 had acted on the instructions of the accused. They were mere subordinates to the accused. There was no evidence

A that SP6 and SP7 knew of the scheme which the accused had prepared and carried out. The accused who does an act by means of another person or persons such as SP6 and SP7 does it himself (see paras 22 & 23).

B (4) The accused had directed SP6 and SP7 to transmit monies to third party recipients through his Patriot Perdana Account. Between 6 and 9 July 1997, the total amount disbursed to them was RM304,000. As such, there was no error in the finding that the prosecution had, at the close of its case, established a prima facie case of criminal breach of trust C under s 408 of the Code. Since in his defence, the accused had chosen to remain silent, pursuant to s 173(h)(iii) of the Criminal Procedure Code the prosecution had proved its case against the accused beyond reasonable doubt. There was no misdirection by the courts below (see paras 29, 37, 39 & 42)

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[Bahasa Malaysia summary

Perayu ('tertuduh') merupakan pengurus cawangan Bank Pertanian Malaysia E cawangan Machang dipertuduh di bawah s 408 Kanun Keseksaan ('Kanun') dengan pecah amanah jenayah akan wang yang telah diamanahkan kepadanya. Tertuduh mengarahkan SP6, pembantu tadbir bertanggungjawab atas unit kewangan di Bank Pertanian Machang dan SP7, juruwang di bank yang sama, untuk menjelaskan cek-cek MBB peribadi tertuduh antara 6 dan F 9 Julai 1997 dan memasukkannya ke dalam akaun Patriot Perdananya. Tertuduh didapati bersalah, disabitkan dan dihukum penjara tiga tahun dan enam kali sebatan. Rayuannya terhadap sabitan dan hukuman ditolak oleh Mahkamah Tinggi dan tertuduh merayu. Peguambela yang bijaksana membangkitkan hujah-hujah berikut: (i) tatkala meletak jawatan pada 9 Julai G 1997, tertuduh bukan lagi pengurus cawangan Bank Pertanian Machang, dan oleh itu bukan lagi pengkhidmat menurut s 408; (ii) bahawa dokumen-dokumen dijana komputer yang dikemukakan menerusi SP4 tidak boleh diterima-pakai kerana dokumen-dokumen tersebut tidak memenuhi kehendak-kehendak s 90A Akta Keterangan 1950 ('Akta'), dan SP4 bukanlah H orang yang bertanggungjawab ke atas komputer yang menghasilkan dokumen-dokumen tersebut, tetapi dia hanya memeriksanya tanpa menjelaskan dari mana dan bagaimana dia mendapat dokumen-dokumen tersebut; (iii) bahawa SP6 dan SP7 merupakan rakan sejenayah, yang mana keterangan mereka perlu disokong, atau ditangani dengan berhati-hati atau I seharusnya diingatkan tentang risiko bertindak atas keterangan itu; dan (iv) bahawa cek-cek MBB tersebut, yang mana merupakan bil-bil pertukaran yang dikeluarkan oleh tertuduh antara 6 dan 9 Julai 1997, adalah sah dan sempurna dikeluarkan untuk dijelaskan, tetapi sehingga 9 Julai 1997 cek-cek tersebut masih belum dijelaskan, yang menjadikan cek-cek tersebut ataupun

transaksi-transaksi yang disandarkan tersebut, tidak boleh membentuk asas apa-apa pertuduhan yang dirangka di bawah s 408 dari 6 hingga 9 Julai 1997.

Diputuskan, menolak rayuan:

(1) Pada 9 Julai 1997, tertuduh masih merupakan pengurus cawangan, kerana perletakkan jawatannya masih lagi belum diterima oleh Bank Pertanian, dan tertuduh masih mengarahkan SP6 dan SP7 untuk menjelaskan cek-cek MBBnya. Tindak-tanduk tertuduh jelas menunjukkan dia masih belum melepaskan jawatannya sebagai pengurus cawangan. Dia masih lagi seorang pengurus cawangan apabila dia memberi arahan tersebut kepada orang-orang bawahannya. Perletakkan jawatannya tidak, secara ipso facto melepaskannya daripada tanggungan jenayah atas arahan yang diberikan kepada orang-orang bawahannya dan juga transaksi yang berlaku pada tarikh tersebut (lihat perenggan 6 & 7).

(2) Seksyen 90A Akta bertujuan untuk membantu dan bukannya menghalang penerimaan dokumen-dokumen, dan pernyataan-pernyataan di dalamnya, yang dihasilkan oleh komputer. SP4 merupakan juruaudit dalaman berpusat di Ibu Pejabat Bank Pertanian di Kuala Lumpur pada tarikh-tarikh yang material. Dia memberikan keterangan lisan tentang pengetahuannya berkaitan operasi dan akses kepada komputer Bank Pertanian, yang mana dia boleh lihat dan peroleh dokumen-dokumen cawangan-cawangan. Dia telah perolehi dokumen-dokumen tersebut yang merupakan cetakan daripada komputer, seperti kebiasannya. Dokumen-dokumen yang dijana komputer tersebut dikemukakan sebagai ekshibit-ekshibit dan memenuhi kehendak-kehendak s 90A (lihat perenggan 13 & 16).

(3) Untuk memperlakukan SP6 dan SP7 sebagai rakan sejenayah, memerlukan keterangan berkaitan pembabitan mereka dalam perlakuan jenayah tersebut, disokong oleh kelakuan salah dan diikuti dengan niat yang salah. Pihak pembelaan tidak pernah mencadangkan keterlibatan atau niat salah SP6 dan SP7 dalam peranan mereka atau pembabitan mereka dalam memindah dan mengeluarkan jumlah tersebut. SP6 dan SP7 bertindak atas arahan-arahan tertuduh. Mereka merupakan orang bawahan tertuduh. Tiada keterangan yang menunjukkan SP6 dan SP7 tahu tentang rancangan yang difikir dan dilaksanakan oleh tertuduh. Tertuduh, yang telah melaksanakan suatu tindakan dengan mempergunakan orang lain, iaitu SP6 dan SP7, telah melaksanakan perbuatan itu dengan sendirinya (lihat perenggan 22 & 23).

(4) Tertuduh telah mengarahkan SP6 dan SP7 memindahkan wang kepada pihak ketiga menerusi akaun Patriot Perdananya. Antara 6 dan 9 Julai 1997, jumlah keseluruhan yang telah dibayar kepada mereka ialah RM304,000. Oleh itu, tiada kekhilafan dalam penemuan bahawa, pihak pendakwaan, pada akhir kesnya, membuktikan kes prima facie pecah amanah jenayah di bawah s 408 Kanun tersebut. Oleh sebab dalam pembelaannya tertuduh memilih untuk mendiamkan diri, berikutan s 173(h)(iii) Kanun Prosedur Jenayah, pihak pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah. Tiada salah arah oleh mahkamah-mahkamah rendah (lihat perenggan 29, 37, 39 & 42).]

Notes

For a case on witness, as accomplice, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 17.

For cases on computer printout, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1152–1162.

For cases on evidence of accomplice, see 7(2) *Mallal's DIgest* (4th Ed, 2006 Reissue) paras 53–64.

For cases on s 408 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1837–1852.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Davies v Director of Public Prosecutions [1954] AC 378, HL (refd)

Gnanasegaran a /l Pararajasingam v PP [1997] 3 MLJ 1; [1997] 4 CLJ 6, CA (refd)

Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134; [2006] 3 CLJ 269, CA (refd)

Mohamed Din v PP [1985] 2 MLJ 251, HC (refd)

Ng Yau Thai v PP [1987] 2 MLJ 214, SC (refd)

PP v Choo Chuan Wang [1992] 3 CLJ 329 (Rep); [1992] 2 CLJ 1242, HC (refd)

R v Shepherd [1991] All ER 225, HL (refd)

Ramachandran v PP [1972] 2 MLJ 183, HC (refd)

Sathiadas v PP [1970] 2 MLJ 241, HC (refd)

Legislation referred to

Criminal Procedure Code s 173(h)(iii), 173(ha)

Evidence Act 1950 ss 3, 62 Explanation 3, 90A, 90A(1), (2), (3), (4), (6), 114 Illustration (b), 133, 405

Penal Code ss 23, 24, 405, 408

Manjeet Singh Dhillon (Manjit Singh Dhillon) for the appellant.
Awang Armadajaya Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Low Hop Bing JCA (delivering judgement of the court):

APPEAL

[1] The appellant ('the accused') was charged, in the first instance, before the Kota Bharu Magistrate's Court, with criminal breach of trust punishable under s 408 of the Penal Code. The charge, as amended at the close of the prosecution's case, was that between 6 and 9 July 1997, at the Machang branch of Bank Pertanian Malaysia, the accused being a servant, to wit, the branch manager, and having been entrusted with RM304,000, did commit the said offence relating to the said sum.

[2] He was found guilty, convicted and sentenced to three years imprisonment and three strokes of whipping. His appeal against the conviction and sentence was dismissed by the High Court. Pursuant to leave granted by this court, he has lodged this appeal. Meanwhile, there was a stay of execution of the sentence, pending disposal of this appeal.

[3] A reference hereinafter to a section is a reference to that section in the Penal Code.

[4] The narrative of facts will be unfolded in our deliberation of the five grounds raised in this appeal.

THE ACCUSED'S RESIGNATION ON 9 JULY 1997

[5] This ground of appeal advocated by learned defence counsel Mr Manjeet Singh Dhillon is that, upon resignation on 9 July 1997, the accused was no longer the branch manager of Bank Pertanian Machang, and hence not a servant under s 408.

[6] Learned deputy public prosecutor Mr Awang Armadajaya bin Awang Mahmud argued that on 9 July 1997, the accused was still the branch manager and had conducted himself in such capacity when he directed SP6 and SP7 to process his Malayan Banking Bhd (MBB) cheque for RM167,000 and to make payment to his Patriot Perdana Account at Bank Pertanian Malaysia. Being the subordinates, SP6 and SP7 did as directed by the accused.

A [7] We note that the trial court had accepted the evidence adduced through Bank Pertanian's personnel manager (SP3) that on 9 July 1997, the accused was still the branch manager, as the accused's resignation had yet to be accepted by Bank Pertanian, and the accused had continued to direct SP6 and SP7 to honour his MBB cheque for RM167,000. This was clearly confirmed
B in the computer printout which showed that the transaction took place on 9 July 1997 at 10.59.03 hours. The accused's conduct, in directing SP6 and SP7 to clear his MBB cheque and disburse cash into his Patriot Perdana Account on 9 July 1997 and to further remit the money to the recipient, clearly indicated that the accused had not relinquished his post as the branch
C manager. In every sense of the word, he was still the branch manager in charge when he gave the said directive to his subordinates, SP6 and SP7. His purported resignation does not ipso facto exonerate him from his criminal liability for the directive given to his subordinates and the transaction that had taken place on that date, as alluded to above.

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ADMISSIBILITY OF COMPUTER DOCUMENTS

[8] Relying on *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134; [2006] 3 CLJ 269 (CA), learned defence counsel advanced the next
E ground that the computer-generated documents viz exhs P9, P11, P13–16 and P18–P21 tendered through SP4 were inadmissible, as they had not satisfied the requirements of s 90A of the Evidence Act 1950, and SP4 was not the person responsible for the computer that produced the documents but had merely examined them in Bank Pertanian Machang, without
F explaining how and where he got the documents, as a result of which, there was no proof as to the movement of funds in the accused's or other beneficiaries' accounts.

G **[9]** The learned deputy supported the admissibility of the computer-generated documents, as had been done in *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1; [1997] 4 CLJ 6 (CA).

[10] For ease of reference, we tabulate these computer-generated
H documents of Bank Pertanian Machang as follows:

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Exhibit	Nature of Document
P9	Accused's Patriot Perdana Statement of Account
P11	Debit Arahan Patriot No 506677 (Patriot Debit Instruction) dated 6 July 1997 for RM32,000
P13	Debit Arahan Patriot No 506678 (Patriot Debit Instruction) dated 6 July 1997 for RM45,000
P14	Laporan Audit (Audit Report) dated 7 July 1997
P15	Pelarasan Jurnal Am (PJA) (General Journal Balancing)
P16	Cheque Pay-in slip for RM52,000
P18	Debit Arahan Patriot (Patriot Debit Instruction) No 506681 for RM40,000
P19	PJA form for July 1997
P20	Laporan Audit (Audit Report) dated 9 July 1997
P21	Cheque Pay-in slip dated 7 July 1997 for RM167,000

[11] The question that falls to be determined under this head is whether, at the trial, these computer-generated documents have been legally admitted under s 90A.

[12] Section 90A merits reproduction in extenso as follows:

90A Admissibility of documents produced by computers, and of statements contained therein.

(1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

(3)(a)It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.

(b) A certificate given under subsection (2) shall be admissible in

A evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.

(4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working
B order and was operating properly in all respects throughout the material part of the period during which the document was produced.

(5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human
C intervention.

(6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or
D civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.
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(7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with
F an offence in such proceeding the person so charged with the offence being a person who was:

(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used;
G or

(b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

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[13] Section 90A came into force on 15 July 1993. It constitutes a statutory exception to the common law hearsay rule, since a document produced by a computer is primary evidence: s 62 Explanation 3 of the same Act. It is intended to facilitate rather than to obstruct the admissibility of documents,
I and statements contained therein, produced by computers.

[14] In *Gnanasegaran*, computer printouts of the statement of accounts tendered in evidence by the bank officer in charge of the operations of the branch were held to have fulfilled the requirements of s 90A, and therefore

admissible. At p 21, Mahadev Shankar JCA (as he then was) explained that s 90A was enacted to bring the 'best evidence rule' up to date with the realities of the electronic age.

[15] In *Hanafi bin Mat Hassan*, the defence objected to the admissibility of the ticket (exh P38D(2)) which was produced by a computer. The ground of objection was that it was not proved by the tendering of a certificate pursuant to s 90A(2). The ticket machine was in good working condition and the ticket had been sold from the machine in the bus driven by the accused from Kuala Lumpur to Port Klang. In the High Court, the learned trial judge relied on *Gnanasegaran*, and admitted the ticket as evidence under s 90A(2). On appeal, this court held that the ticket has been correctly admitted though not on the grounds given by the learned trial judge. Augustine Paul JCA (now FCJ) who delivered the judgment of the court also referred to *Gnanasegaran*, and enunciated at pp 153–154 (MLJ); pp 301–307 (CLJ) the principles which may be crystallised as follows:

(1) Under s 90A(1), in order for a document produced by a computer to be admitted in evidence, the condition precedent is that it must have been produced by the computer in the course of its ordinary use; and this condition may be proved by tendering in evidence a certificate as stipulated by s 90A(2), read with s 90A(3);

(2) Once the certificate is tendered as evidence, the presumption contained in s 90A(4) is activated to establish that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced;

(3) The use of the words 'may be proved' in s 90A(2) indicates that the tendering of the certificate is not a mandatory requirement in all cases, as the use of the certificate can be substituted with oral evidence to the same effect: *R v Shepherd* [1991] All ER 225 (HL), which dealt with a provision of law similar to our s 90A;

(4) The nature of oral evidence required to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. It will very rarely be necessary to call an expert and in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowledge of what the computer is required to do and who can say that it is doing it properly: per Lord Griffiths in *R v Shepherd*, at p 231;

(5) The purpose of tendering in evidence a certificate under s 90A(2) is to establish that a document was produced by a computer in the ordinary

course of its use, while s 90A(6) deems a document produced by a computer to have been produced by the computer in the course of its ordinary use;

(6) The object of s 90A(6) is to serve some purpose other than that provided in s 90A(1). Section 90A(6) does not contain the condition precedent prescribed in s 90A(1), but contains a deeming provision to that effect. Section 90A(6) applies only to a document which does not come within the scope of s 90A(1); and

(7) In the case of s 90A(6), once its deeming part becomes applicable to a document which was not produced by a computer in the ordinary course of its use, the condition precedent in s 90A(1) would have been satisfied in order to render it admissible. However, the requirement of s 90A(4) must still be established, by tendering the certificate under s 90A(2), or by way of oral evidence.

[16] Reverting to the facts in the instant appeal, it is to be noted that SP4 was the internal auditor based at the Bank Pertanian Head Office in Kuala Lumpur on the material dates. He has given oral evidence of his knowledge of the operations of and access to Bank Pertanian's computer, from which he could view and obtain the documents of the branches. He had obtained the aforesaid documents which were the printouts from the computer in the course of its ordinary use. These computer-generated documents have been tendered as the exhibits tabulated above. We are of the view that these documents have satisfied the requirements of s 90A. Hence, the answer to the above question is in the affirmative.

ACCOMPLICE EVIDENCE

[17] The defence cited *Mohamed Din v Public Prosecutor* [1985] 2 MLJ 251; and *Ng Yau Thai v Public Prosecutor* [1987] 2 MLJ 214 in support of the submission that SP6 and SP7 are accomplices, whose evidence should be corroborated, or treated with great suspicion or there should be warning on the danger of acting on such evidence.

[18] In arguing that these two prosecution witnesses are not accomplices, the learned deputy referred to the defence cross-examination at the trial, where the defence had never suggested any fact or circumstance from which mens rea on the part of these witnesses may be inferred.

[19] We would give priority to the consideration of the authorities cited for the accused, viz:

(1) *Mohamed Din*

Before purchasing a weed killer from PW12, for a company, the appellant had asked for commission amounting to $23,773.50 which PW12 agreed to give. This was embodied in PW12's letter dated 14 October 1980 to the appellant. PW12 instructed his clerk in Singapore to prepare a receipt dated 4 December 1980 which the appellant signed in PW12's presence in Singapore. The appellant sent someone with a letter to collect the money on his behalf. PW12 said that he paid the money to the bearer of that letter which had the appellant's signature on it but that was denied by the appellant in his defence. Gunn Chit Tuan J (later CJ(M)) held that PW12 who had played an active part in the negotiation of the transaction and was quite prepared to bribe the appellant for that purpose, was an accomplice, whose evidence should be treated with great suspicion and independently confirmed on every material circumstance.

(2) *Ng Yau Thai*

The Supreme Court speaking through Seah SCJ (as he then was) explained, inter alia, that:

(a) The law in Malaysia which deals with the evidence of an accomplice who gives testimony for the prosecution is contained in ss 133 and 114 Illustration (b) of the Evidence Act 1950; and

(b) Where the trial judge has convicted on the uncorroborated evidence of an accomplice, the mind of the trial judge can only be gathered from the contents of his judgment and nowhere else.

[20] In addition to the enunciation of the relevant principles governing accomplice evidence in these two authorities, we would respectfully set out the following:

(1) There is, in the authorities, no formal definition of the term 'accomplice'. The natural and primary meaning may be deduced from the cases in which X, Y and Z have been held to be, or held liable to be treated as accomplices eg persons who are called as witnesses for the prosecution being particeps criminis in respect of the actual crime charged, whether as principal offenders or aiders and abettors: per Lord Simonds in *Davies v Director of Public Prosecutions* [1954] AC 378 at p 400 (HL). See also *Ramachandran v Public Prosecutor* [1972] 2 MLJ 183 HC Singapore per FA Chua J; and *Public Prosecutor v Choo Chuan Wang* [1992] 3 CLJ 329 (Rep); [1992] 2 CLJ 1242 (HC), per Edgar Joseph Jr J (later FCJ); and

(2) An accomplice being particeps criminis is one who participates or is associated with another person as a partner in the commission of a crime. A crime involves two essential elements viz actus reus which is the wrongful act, and mens rea which is the guilty mind. This is

A reflected in the maxim 'actus non facit reum nisi mens sit rea' (the act and the mind must concur to constitute the crime). An act does not make a person guilty unless his mind be guilty. This principle, which applies to the commission of an offence as a principal offender, applies with equal force to an accomplice.

B

[21] The question whether a prosecution witness is an accomplice, or is liable to be treated as an accomplice, has to be determined by examining the evidence adduced at the trial.

C **[22]** In the context of the instant appeal, in order to treat SP6 and SP7 as accomplices, there must be evidence of the participation by SP6 and SP7 in the commission of the offence in question. The participation must be supported by a wrongful act and accompanied by a guilty mind. The evidence adduced at the trial shows that the accused had directed SP6, the D administrative assistant in charge of the financial unit at Bank Pertanian Machang at the material time, and SP7, the teller at the same bank, to clear the accused's personal MBB cheques on the respective dates, and credit them into his Patriot Perdana Account No 0410/000313/9/201 in Bank Pertanian Machang where the accused worked as the branch manager. On the respective E dates as well, the accused also directed SP6 and SP7 to transmit monies into several accounts through his Patriot Perdana Account and Inter-Branch Standing Instructions.

[23] The issue raised for the defence relating to the role played by SP6 and F SP7 respectively must be tested against the evidence of these two witnesses. At the trial in the magistrate's court, the evidence of SP6 is to be found at pp 64–75 of the High Court appeal record, while SP7's evidence appears at pp 76–100. It is singularly significant to note that the defence had never suggested the complicity or guilty mind of SP6 and SP7 in relation to their G role or participation in the transfers and withdrawals of the amount in question. The true position is that on the material dates, SP6 and SP7 had acted on the instructions of the accused who was the branch manager there. They were mere subordinates to the accused who had instructed them to dance to his music. There is no evidence that SP6 and SP7 knew of the H scheme which the accused had prepared and carried out. As a matter of fact, the accused had used SP6 and SP7 as a means to his end. The accused who does an act by means of another person or persons such as SP6 and SP7 does it himself: *qui facit per alium facit per se*.

I **[24]** We hold that this ground of appeal is without any substance.

DRAWING, CLEARANCE AND RETURN OF CHEQUES

[25] Two remaining grounds of appeal are inter-related. They concern the

drawing, clearance and return of cheques. It was contended for the defence that the MBB cheques, being bills of exchange drawn by the accused between 6 and 9 July 1997, were validly and properly presented for clearance, but by 9 July 1997 they had yet to be cleared, in which case, the said cheques or the underlying transactions could not form the basis of any charge framed under s 408 between 6 and 9 July 1997.

[26] The prosecution responded that the accused had directed SP6 and SP7 to honour the accused's MBB cheques and transfer the total amount into the accused's Patriot Perdana Account in Bank Pertanian Machang, in which case, the accused was entrusted with the money. From the Patriot Perdana Account, the accused had wrongfully directed SP6 and SP7 to disburse the money.

[27] We now tabulate the accused's drawings of the MBB cheques as follows:

DATE	CHEQUE	AMOUNT
6 July 1997	MBB Rantau Panjang No 537638	RM32,000
6 July 1997	MBB Rantau Panjang No 537639	RM45,000
7 July 1997	MBB Rantau Panjang No 537640	RM52,000
8 July 1997	MBB Rantau Panjang No 537641	RM40,000
9 July 1997	MBB Rantau Panjang No 537642	RM167,000
Total		RM336,000

[28] On the respective dates, the accused had directed SP6 and SP7 to clear and credit his MBB cheques into his Patriot Perdana Account in the Bank Pertanian Machang branch of which he was the manager. In that capacity, the accused was entrusted with or has dominion over the money transferred to Bank Pertanian Machang.

[29] Meanwhile, the accused had directed SP6 and SP7 to transmit monies to the recipients through his Patriot Perdana Account and Inter-Branch Standing Instructions *(Arahan Patriot dan Deposit Antara Cawangan*) ('AP'). Other than one recipient, ie Mohd Zulkifli bin Mohd Yusof, for the amount of RM32,000, two other recipients viz Wan Muda bin Wan Ismail (SP9) and Ismail bin Ali (SP10), confirmed that between 6 and 9 July 1997, the total amount disbursed to them was RM304,000, as particularised below:

DATE	RECIPIENT/AMOUNT	AP/ACCOUNT
6 July 1997	Wan Muda bin Wan Ismail (RM45,000)	AP 01220643
7 July 1997	Ismail bin Ali (through Inter Branch deposit — K Terengganu) (RM52,000)	14010033483201
8 July 1997	Wan Muda bin Wan Ismail (RM40,000)	14010033483201
9 July 1997	Ismail bin Ali (through Inter Branch deposit — K Terengganu) (RM167,000)	
Total	RM304,000	

[30] However, on 19 July 1997, the accused's MBB cheques were returned, due to insufficient funds. The accused's MBB cheques being outstation cheques took eight to 14 days to clear, as Malayan Banking and Bank Pertanian are two different legal entities, and money paid out of the payer's bank account is subject to sufficiency of funds.

[31] It is obvious that even before his MBB cheques were cleared by Malayan Banking Rantau Panjang branch, the accused had directed SP6 and SP7 to deposit the monies into the accused's Patriot Perdana Account at Bank Pertanian Machang.

[32] The accused's intention in directing SP6 and SP7 to cash his MBB cheques was to make the above payments to the recipients. The corroborative evidence of SP9 and SP10, as two of the recipients, points to the accused's conduct in ensuring that the monies deposited in the Bank Pertanian Machang branch could be paid out to the recipients on the respective dates, thereby causing wrongful loss to Bank Pertanian and wrongful gain to the recipients. This is evidence of the element of dishonesty on the part of the accused.

[33] Where relevant, s 405 provides for the offence of criminal breach of trust as follows:

> 405 Criminal breach of trust
>
> Whoever, being in any manner entrusted with property, or with any dominion over property ... dishonestly ... disposes of that property, commits 'criminal breach of trust'.

[34] Section 24 defines the word 'dishonestly' as follows: A

24 Dishonestly

Whoever does anything with the intention of causing wrongful gain to one person, or wrongly loss to another person, irrespective of whether the act causes wrongful loss or gain, is said to do that thing 'dishonestly'. B

[35] 'Wrongful gain' and 'wrongful loss' are in turn defined is s 23 as follows: C

'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled.

'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled. D

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property. E

[36] In *Sathiadas v Public Prosecutor* [1970] 2 MLJ 241, Raja Azlan Shah J (now HRH the Sultan of Perak) aptly enunciated, inter alia, that:

(1) the gist of the offence of criminal breach of trust is entrustment and dishonest misappropriation; F

(2) the receipt of money for a particular purpose constitutes entrustment;

(3) dishonest misappropriation involves wrongful gain to the appellant or wrongful loss to his employer for the period of the retention of the money. That must depend on the facts and circumstances of each case; and G

(4) criminal breach of trust is not an offence which counts as one of its factors, the loss that is the consequence of the act; it is the act itself, which in law, amounts to an offence. The offence is complete when there is dishonest misappropriation. H

[37] Upon a careful consideration of the evidence adduced at the trial, and the grounds of judgment of both the courts below, we are unable to identify any error in their respective finding that the prosecution had, at the close of its case, established a prima facie case of criminal breach of trust under s 408, for which the accused was ordered to enter on his defence. I

A THE ACCUSED REMAINING SILENT

[38] In his defence, the accused has, under s 173(ha) of the Criminal Procedure Code, three alternatives viz:

B (1) to give evidence on oath and subject his evidence to cross-examination by the prosecution;

(2) to make a statement from the dock in which case the prosecution has no right to cross-examine him; or

C (3) to remain silent. This was the alternative the accused had elected.

[39] Consequently, pursuant to s 173(h)(iii) thereof, the learned magistrate concluded that the prosecution has proved its case against the accused beyond reasonable doubt and convicted him.

D

[40] The learned High Court judge had, on appeal, considered the evidence at length in his careful judgment, and found that the learned magistrate's decision was correct.

E

[41] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, the Federal Court speaking through Augustine Paul JCA (now FCJ) explained that:

(1) a prima facie case is one that is sufficient for the accused to be called
F upon to answer, which means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal;

(2) the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a
G prudent man ought to act upon the supposition that those facts exist or did happen, within the meaning of the word 'proved' in s 3 of the Evidence Act 1950;

(3) if it is not rebutted, the prima facie case must prevail, and if the accused
H elects to remain silent, he must be convicted; and

(4) where the accused remains silent, there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt.

I

[42] On the facts and the law, in so far as the conviction and sentence are concerned, we are unable to find any misdirection by the courts below.

CONCLUSION

[43] For reasons given above, the accused's appeal is dismissed. The conviction and sentence imposed by the trial court, as upheld by the High Court, are hereby affirmed.

[44] My learned brothers, Abdull Hamid Embong and Ahmad bin Hj Maarop JJCA have read this judgment in draft and have expressed their agreement with it to become the judgment of the court.

Appeal dismissed.

Reported by Kanesh Sundrum